

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KENNETH LEE CRONK,

Plaintiff,

v.

CITY OF WEST RICHLAND, et al.,

Defendants.

No. 4:14-CV-5041-EFS

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT AND  
GRANTING MOTION TO EXCLUDE  
EXPERTS**

Plaintiff, Mr. Kenneth Cronk, is suing the City of West Richland, and many of its governing officers, for alleged civil rights violations resulting from the issuance of two separate notices of trespass by the city barring him from coming on city property. ECF No. 1. He claims these actions violated his rights under the First and Fourteenth Amendment and is seeking damages under 42 U.S.C. § 1983. He also claims that certain city officials conspired to deprive him of these rights in violation of 42 U.S.C. § 1985. Finally, he claims that the city itself is liable under a *Monell* theory of liability. Defendants respond that Mr. Cronk was given the notices of trespass after he was routinely disruptive at city council meetings and made "threatening statements" to a government staffer. See ECF No. 55. They claim that this was a reasonable restriction that did not deprive Mr. Cronk of his rights. *Id.* They also claim that they are protected by

1 qualified immunity. Defendants have moved for summary judgment and for  
2 exclusion of Plaintiff's experts.

3 **I. FACTUAL HISTORY**

4 Mr. Cronk has been a citizen of West Richland for over thirty  
5 years and was a regular attendee of the West Richland city council  
6 meetings. ECF No. 73 at 2. By his own admission, Mr. Cronk attended  
7 eleven city council meetings between April 2008 and November 2013. *Id.*  
8 At each of these meetings, Mr. Cronk spoke during the public comment  
9 period. *See id.* at 3-5. His complaints, however, were always the same.

10 According to Mr. Cronk, in 2006 and 2007, a series of incidents  
11 occurred at his home involving his son, a "mentally disabled third  
12 party," and Mr. Cronk's wife that resulted in the hospitalization of  
13 Ms. Cronk and criminal citations being issued to Mr. Cronk's wife and  
14 son. *See* ECF Nos. 56 & 73. Mr. Cronk believes that the police  
15 investigation was improper and insufficient. *Id.* The Chief of Police  
16 for the City of West Richland, Brian McElroy, met with Mr. Cronk and  
17 personally looked into the matter. ECF No. 58 at 4. Reportedly, Chief  
18 McElroy concluded there was nothing to be done. *Id.* As a result, Mr.  
19 Cronk began protesting this "inept" police work both in public and at  
20 the city council meetings he attended. ECF Nos. 56 & 73. Every time  
21 that Mr. Cronk attended the city council meetings, he would air these  
22 same grievances. ECF No. 66 at 3. The city claims that this repeated  
23 use of the public comment period for personal grievances was a  
24 disruption of the city council proceedings. *Id.* at 4. Generally,  
25 however, the record indicates that the city councilors were willing to  
26

1 let Mr. Cronk air his claims but repeatedly told him that nothing more  
2 could be done. See ECF No. 56 at 7.

3 On June 19, 2012, the City of West Richland issued a notice of  
4 trespass to Mr. Cronk informing him that he was "not to enter or  
5 remain at the properties located at 3801 West Van Giesen, West  
6 Richland, WA 99353." ECF No. 51, Ex. A. The notice explained that if  
7 he did enter he would be subject to arrest and criminal prosecution  
8 for trespass. *Id.* In this notice, there was no procedure by which Mr.  
9 Cronk could enter city hall to conduct business with the city nor by  
10 which he could challenge the notice. See *id.* The property at 3801 West  
11 Van Giesen was home to West Richland City Hall and Public Works  
12 Department. ECF No. 56 at 16. This notice was issued by Mayor Donna  
13 Noski after she had conversations about Mr. Cronk with Police Chief  
14 Brian McElroy and City Attorney Bronson Brown.

15 During June or July of 2012, Mr. Cronk would routinely deliver  
16 documents relating to a pending lawsuit against the City to West  
17 Richland city hall. ECF No. 67 at 4. On one occasion during that time  
18 period, Mr. Cronk delivered documents to Ms. Richardson the West  
19 Richland City Clerk. Ms. Richardson alleges that during their  
20 conversation, Mr. Cronk said something to the effect that he "had to  
21 take medications so that he doesn't think about shooting people." ECF  
22 No. 67 at 4. Ms. Richardson reported this statement to her superiors.  
23 *Id.* at 5. Mr. Cronk denies the allegation. ECF No. 78-1 ¶¶ 37-38  
24 (denying generally that he ever threatened anyone but not denying that  
25 he made the specific statement). He claims that he has never  
26 threatened any governmental employee. *Id.* He claims that he merely

1 stated his displeasure and that he "had the right to 'sue' each of the  
2 departments or agencies." *Id.* Ms. Richardson and others at the city  
3 believed that Mr. Cronk had been a Hanford patrol officer, that he is  
4 a veteran, and that he suffers from PTSD. ECF No. 56 at 9. These  
5 facts, combined with Mr. Cronk's statement and his repeated and  
6 fervent criticisms of the city, led Police Chief McElroy and Major  
7 Noski to believe that Mr. Cronk was a public safety concern.<sup>1</sup> *Id.* at  
8 10-12.

9 On August 29, 2012, a second notice of trespass was issued to  
10 Mr. Cronk also banning him from 3803 W. Van Giesen Street, which is  
11 the public library. ECF Nos. 58-2 & 55 at 16. City council meetings  
12 were held at the public library. This notice was also modified to say  
13 that if Mr. Cronk needed to access city property or facilities, he  
14 should contact the Chief of Police's office and the Chief would help  
15 with whatever he needed.

16 On November 5, 2013, for the first time in over a year after the  
17 notice of trespass was issued, Mr. Cronk attended the city council  
18 meeting to inquire as to why he was sent the notices of trespass. ECF  
19 No. 73 at 8-9. The city council informed him that they would look into  
20 it and have an answer at their next meeting. At the next meeting on  
21 November 19, 2013, Mr. Cronk again raised the issue. *Id.* The council  
22 referred him to the Chief of Police. *Id.* Mr. Cronk was not asked to  
23 leave either of these city council meetings. However, after the second

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24 <sup>1</sup> Defendants dispute this chronology of events. Defendants claim the  
25 threatening statement was made prior to issuing the first notice of trespass  
26 on June 19, 2012. The only lawsuit the Court is aware of, however, is *Cronk*  
*v. City of West Richland*, 12-CV-5094-TOR, which was filed on July 18, 2012.  
There may have been a different lawsuit pending in some other court but there  
are no facts to support that inference.

1 meeting, Chief McElroy wrote to Mr. Cronk and reiterated that Mr.  
2 Cronk was allowed to go to the council meetings but needed to contact  
3 the Chief before he did so. ECF Nos. 56 at 21 & 58-3.

## 4 II. DISCUSSION

5 Mr. Cronk has now sued the City of West Richland claiming that  
6 the notices of trespass are a violation of his First and Fourteenth  
7 Amendment rights and is suing for damages under 42 U.S.C. § 1983. He  
8 further claims a conspiracy by government officials to deprive him of  
9 said rights under 42 U.S.C. § 1985. Finally, he claims the City of  
10 West Richland is liable under a *Moneill* theory of liability. The  
11 original complaint also included a number of state law claims but  
12 those were previously dismissed via summary judgment. Now, Defendants  
13 move for summary judgment on Mr. Cronk's remaining federal claims.  
14 They claim that they are protected by qualified immunity and that they  
15 did not violate Mr. Cronk's rights.

16 Summary judgment is appropriate if the record establishes "no  
17 genuine dispute as to any material fact and the movant is entitled to  
18 judgment as a matter of law." Fed. R. Civ. P. 56(a). The party  
19 opposing summary judgment must point to specific facts establishing a  
20 genuine dispute of material fact for trial. *Celotex Corp. v. Catrett*,  
21 477 U.S. 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*  
22 *Corp.*, 475 U.S. 574, 586-87 (1986). If the non-moving party fails to  
23 make such a showing for any of the elements essential to its case for  
24 which it bears the burden of proof, the trial court should grant the  
25 summary-judgment motion. *Celotex Corp.*, 477 U.S. at 322. The Court  
26

1 must view the facts in light most favorable to the non-moving party.  
2 See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

3 A. Qualified Immunity

4 The Court must begin by addressing Defendants' claim of qualified  
5 immunity. "The doctrine of qualified immunity protects government  
6 officials from liability for civil damages insofar as their conduct  
7 does not violate clearly established statutory or constitutional  
8 rights of which a reasonable person would have known." *Pearson v.*  
9 *Callahan*, 555 U.S. 223, 231 (2009) (internal quotations omitted).  
10 Qualified immunity is an "immunity from suit rather than a mere  
11 defense to liability." *Id.* Therefore, the Court must resolve the issue  
12 of qualified immunity "at the earliest possible stage in litigation."  
13 *Id.* To overcome a qualified immunity defense, the Plaintiff must show  
14 that the Defendants "violated his [] rights, and that this violation  
15 was of a clearly established statutory or constitutional right of  
16 which a reasonable person would have known." *Reza v. Pearce*, No. 13-  
17 15154, 2015 WL 4899122, at \*4 (9th Cir. Aug. 18, 2015). For the  
18 reasons set forth below, the Court finds that there are several  
19 genuine disputes as to material facts. Taking those facts in the light  
20 most favorable to Mr. Cronk, a reasonable jury could find that  
21 Defendants' actions violated Mr. Cronk's clearly established First and  
22 Fourteenth Amendment rights and, therefore, Defendants are not  
23 protected by qualified immunity.

24 B. First Amendment Violation; 42 U.S.C. § 1983

25 Mr. Cronk claims that the notices of trespass, barring him from  
26 city property, violated his First Amendment rights. In determining

1 whether Defendants' actions violated Mr. Cronk's First Amendment  
2 rights, we must begin by determining from what type of forum was Mr.  
3 Cronk banned. See *Reza*, \_\_ F.3d at \*4. Federal courts generally  
4 recognize three types of public fora: (1) traditional public fora; (2)  
5 designated public fora; and (3) limited public fora. *Perry Educ. Ass'n*  
6 *v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). Traditional  
7 public fora are areas historically used by the public for assembly,  
8 such as sidewalks and parks. *Id.* Designated public fora are those  
9 where "the government intentionally opens a nontraditional forum for  
10 public discourse." *Reza*, \_\_ F.3d at \*4 (quoting *DiLoreto v. Downey*  
11 *Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964 (9th Cir. 1999)).  
12 Limited public fora are public property "limited to use by certain  
13 groups or dedicated solely to the discussion of certain subjects."  
14 *Pleasant Grove City, Utah v. Sumnum*, 555 U.S. 460, 470 (2010). The  
15 Ninth Circuit Court of Appeals has held "that city council meetings,  
16 where the public has the opportunity to address officers of a local  
17 government or local governmental agency," like the one Mr. Cronk was  
18 barred from attending, "are limited public fora." *Reza*, \_\_ F.3d at \*4.

19 "[I]n order to safeguard the purpose of a limited public forum,  
20 the government may restrict speech in that forum." *Reza*, \_\_ F.3d at \*4  
21 (quoting *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir.  
22 1990)). "In addition to time, place, and manner regulations, the state  
23 may reserve the forum for its intended purposes, communicative or  
24 otherwise, as long as the regulation on speech is reasonable and not  
25 an effort to suppress expression merely because public officials  
26 oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46.

1 According to the record before the Court, the restrictions  
2 imposed on Mr. Cronk were viewpoint neutral. All of the declarations,  
3 affidavits, and other evidence submitted to the Court support the fact  
4 that Mayor Noski, Chief McElroy, and Mr. Brown, trespassed Mr. Cronk  
5 because he was disruptive and made threatening statements and not  
6 because of what he was saying. But even viewpoint neutral restrictions  
7 must be reasonable. *See Reza*, \_\_ F.3d at \*4. On this record, the Court  
8 finds several material issues as to disputed facts that control  
9 whether or not the city's restrictions were reasonable.

10 First, it is unclear how disruptive Mr. Cronk truly was during  
11 the city council meetings. The Mayor, the Chief of Police, the City  
12 Attorney, and all of the city councilors each submitted declarations  
13 to the Court discussing how disruptive Mr. Cronk was. *See* ECF Nos. 57-  
14 66. However, by the Defendants' own factual assertions, Mr. Cronk was  
15 never violent or threatening during city council meetings, nor did he  
16 engage in any minor disruptions such as speaking past the time limit.  
17 The most he did, according to Defendants, was that he spoke off topic.  
18 ECF No. 56 at 6-7. Each time Mr. Cronk spoke, the city simply told him  
19 that they had already looked into the issue and that there was nothing  
20 to be done. *Id.* This would end the "disruption." *See Id.*

21 Additionally, it is disputed whether or not Mr. Cronk made any  
22 threatening statements to city hall staff. Ms. Julie Richardson claims  
23 that Mr. Cronk "made a comment to the effect that he 'had to take  
24 medications so that he doesn't think about shooting people.'" ECF No.  
25 67 at 4. She is the only person who claims to have ever heard any  
26 threatening statements made by Mr. Cronk. Mr. Cronk, however,



1 generally denies having ever threatened any government employee. See  
2 ECF No. 78-1 at ¶¶ 37-38. He does not, however, specifically deny  
3 making the specific statement to Ms. Richardson.

4 Finally, as indicated above, there are even disputes as to the  
5 basic chronology of events. Mr. Cronk asserts that the first notice of  
6 trespass was issued prior to the time when the city claims that Mr.  
7 Cronk made his threatening statement and claims that he did not  
8 violate the protective order until he went to the city council meeting  
9 in November 2013. But Mr. Cronk contradicts himself when he admits  
10 that he delivered documents to the clerk in July 2012. The city also  
11 contradicts itself when it claims that the June 19, 2012 notice of  
12 trespass was not sent out until after Mr. Cronk made threatening  
13 statements while delivering documents relating to Mr. Cronk's "pending  
14 lawsuit" against the city. The only suit the Court is aware of is the  
15 one filed in this Court on July 18, 2012. On the record before the  
16 Court, there is a genuine issue of material fact as to whether the  
17 first notice of trespass was in response to the alleged threat.

18 Therefore, the Court denies Defendants' Motion for Summary  
19 Judgment as to the First Amendment violations.

20 C. Fourteenth Amendment Violation; 42 U.S.C. § 1983

21 Mr. Cronk also claims that the city violated his procedural due  
22 process rights, under Fourteenth Amendment, when it banned him from  
23 city property.<sup>2</sup> The Fourteenth Amendment states, ". . . nor shall any  
24 state deprive any person of life, liberty, or property, without due

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25 <sup>2</sup> Mr. Cronk did not respond to Defendants' motion for summary judgment  
26 regarding the Fourteenth Amendment in his briefing. However, it was raised in  
oral argument and discussed at length. Therefore, the Court finds it  
appropriate to decide the matter on its merits.

1 process of law." "The requirements of procedural due process apply  
2 only to the deprivation of interests encompassed by the Fourteenth  
3 Amendment's protection of liberty and property." *Bd. of Regents of*  
4 *State Colleges v. Roth*, 408 U.S. 564, 569 (1972). The Supreme Court  
5 has not attempted to define "liberty" under the Fourteenth Amendment,  
6 but

7 [w]ithout doubt, it denotes not merely freedom from  
8 bodily restraint but also the right of the individual to  
9 contract, to engage in any of the common occupations of  
10 life, to acquire useful knowledge, to marry, establish a  
11 home and bring up children, to worship God according to the  
dictates of his own conscience, and generally to enjoy  
those privileges long recognized as essential to the  
orderly pursuit of happiness by free men.

12 *Id.*

13 When a person is deprived of a significant interest, absent  
14 extraordinary circumstances where government interests justify waiting  
15 until after the deprivation, "the right to some kind of prior hearing  
16 is paramount." *Id. See also, Boddie v. Connecticut*, 401 U.S. 371, 378  
(1971).

17 Here, Mr. Cronk claims that he was deprived of his First  
18 Amendment right of free speech and right to petition the government  
19 when he was banned from city property. He also claims that he was not  
20 given notice and an opportunity to be heard either before or after the  
21 notice was sent. Again, how the factual discrepancies highlighted  
22 above are resolved will inform what process Mr. Cronk should have been  
23 afforded. If it is found that Mr. Cronk was a legitimate safety  
24 concern, then a hearing after the deprivation may have been  
25 appropriate. What is clear, however, is that some procedure was due to  
26

1 Mr. Cronk and, based solely on the text of the notices, Mr. Cronk was  
2 given none. Neither notice of trespass afforded him an opportunity to  
3 challenge the deprivation. See ECF Nos. 57-1 & 57-3. The first notice  
4 was a complete, total, and unending bar from city property. ECF No.  
5 51-1.

6 For these reasons, the Court denies the Defendants' Motion for  
7 Summary Judgment as to the Fourteenth Amendment claim.

8 D. Conspiracy Claim; 42 U.S.C. § 1985

9 The Defendants also move to dismiss the conspiracy claim arguing  
10 a lack of evidence. "A civil conspiracy is a combination of two or  
11 more persons who, by some concerted action, intend to accomplish some  
12 unlawful objective for the purpose of harming another which results in  
13 damage." *Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330, 1343 (9th  
14 Cir.1990) (citation and internal quotation marks omitted). To prove a  
15 civil conspiracy, the plaintiff must show that the conspiring parties  
16 "reached a unity of purpose or a common design and understanding, or a  
17 meeting of the minds in an unlawful arrangement." *Id.* (citation and  
18 internal quotation marks omitted). "To be liable, each participant in  
19 the conspiracy need not know the exact details of the plan, but each  
20 participant must at least share the common objective of the  
21 conspiracy." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865  
22 F.2d 1539, 1541 (9th Cir.1989) (en banc). A defendant's knowledge of  
23 and participation in a conspiracy may be inferred from circumstantial  
24 evidence and from evidence of the defendant's actions. See *United*  
25 *States v. Calabrese*, 825 F.2d 1342, 1348 (9th Cir. 1987) (involving a  
26 criminal conspiracy).

1 Here, the Defendants argue that there is insufficient evidence  
2 to find that a conspiracy to deny Mr. Cronk of his civil rights  
3 occurred. ECF No. 55 at 16. Their claim rests largely on the argument  
4 that there was no constitutional violation to begin with and,  
5 therefore, there could be no conspiracy. As discussed above, there are  
6 disputed material facts which could lead a jury to find that Mr.  
7 Cronk's rights were, in fact, violated. Additionally, the Defendants'  
8 declarations repeatedly reflect conversations between the Mayor, the  
9 Chief of Police, and the City Attorney about a course of action  
10 regarding Mr. Cronk. There were many letters and admissions that  
11 support the fact that the three of them agreed that Mr. Cronk should  
12 be trespassed. If it is determined that Mr. Cronk's rights were  
13 violated when they trespassed him, there is circumstantial evidence  
14 that might support a finding that they conspired to do so.

15 During oral arguments, the parties stipulated to the fact that  
16 there was no evidence in the record to show that that the city council  
17 members were involved in any alleged conspiracy. Therefore, the  
18 parties agreed to the dismissal of the conspiracy claims as to the  
19 city council members.

20 For the reasons stated above, the Court grants Defendants'  
21 Motion for Summary Judgment as to the conspiracy claims only as  
22 alleged against city council members. The Court denies Defendants'  
23 Motion for Summary Judgment as to the Conspiracy claims alleged  
24 against Mayor Donna Noski, Chief Brian McElroy, and Mr. Bronson Brown.

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1 E. Monell Liability

2 Mr. Cronk alleges that the City of Richland is also liable under  
3 a *Monell* theory of liability. Defendants have moved for summary  
4 judgment arguing Mr. Cronk has provided no evidence to show that there  
5 is a policy or custom of trespassing citizens.

6 Under *Monell v. Department of Social Services of City of New*  
7 *York*, 436 U.S. 658 (1978),

8 a local government may not be sued under § 1983 for an  
9 injury inflicted solely by its employees or agents.  
10 Instead, it is when execution of a government's policy or  
11 custom, whether made by its lawmakers or by those whose  
edicts or acts may fairly be said to represent official  
policy, inflicts the injury that the government as an  
entity is responsible under § 1983.

12 Defendants are correct in that Mr. Cronk has shown no other incidents  
13 where similar alleged violations have occurred. However, this is not  
14 the only manner by which a municipality may be found liable under  
15 *Monell*.

16 "[A] local government may be held liable under § 1983 when the  
17 individual who committed the constitutional tort was an official with  
18 final policy-making authority . . ." *Clouthier v. Cnty. of Contra*  
19 *Costa*, 591 F.3d 1232, 1250 (9th Cir. 2010) (quoting *Gillette v.*  
20 *Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992)). "There must . . . be  
21 evidence of a conscious, affirmative choice." *Gillette*, 979 F.2d at  
22 1347. Liability "attaches only where a deliberate choice to follow a  
23 course of action is made from among various alternatives by the  
24 official or officials responsible for establishing final policy with  
25 respect to the subject matter in question." *Id.*

1 Here, the Mayor of the City of West Richland signed the two  
2 notices of trespass against Mr. Cronk. During oral argument,  
3 Additionally, by her own admissions, she chose the notice of trespass  
4 over various alternatives. ECF No. 66 at 5-6 ("I discussed possible  
5 options . . . . the Chief conveyed several possible options to me . .  
6 . . This option was selected because it seemed to be the least  
7 intrusive on Mr. Cronk.").

8 The Court makes no finding as to whether Mr. Cronk's rights were  
9 violated. But what is undisputed is that the actions taken by the city  
10 were taken by Mayor Noski, that she was the final policy making  
11 authority on the subject, and that she weighed several options before  
12 making her decision. As a result, if it is determined that Mr. Cronk's  
13 rights were violated, the city could be held liable under a *Monell*  
14 theory of liability.

15 F. The City Council Members' Liability

16 In his complaint, Mr. Cronk alleges all of the above discussed  
17 claims against the city council members in their personal capacity.  
18 However, no evidence has been provided to show that any of them were  
19 involved in the decision to trespass Mr. Cronk. All that is shown is  
20 that the city council members were informed of the decision after it  
21 was made by the mayor.

22 "In order for a person acting under color of state law to be  
23 liable under section 1983 there must be a showing of personal  
24 participation in the alleged rights deprivation . . ." *Jones v.*  
25 *Williams*, 297 F.3d 930, 934 (9th Cir. 2002). *See also, Taylor v. List*,  
26 880 F.2d 1040, 1045 (9th Cir. 1989) ("Liability under section 1983

1 arises only upon a showing of personal participation by the  
2 defendant." ). A defendant may also be liable if he or she is a  
3 supervisor "knew of the violations [by the employee] and failed to act  
4 to prevent them." *Taylor*, 880 F.2d at 1045.

5 Here, no evidence has been offered to show that the city council  
6 members participated in any of the violations alleged by Mr. Cronk.  
7 There is also no evidence to show that any of the council members knew  
8 that the notices of trespass were being sent. The only evidence in the  
9 record shows that the council members were told of the notices after  
10 they had been sent. In any event, it is unclear whether the city  
11 council would be the "supervisor" of the Mayor with the power to  
12 override her authority. However, Plaintiff's counsel agreed that Mayor  
13 Noski was the final policy making authority, subjecting the city to  
14 liability, and that the city council was the legislative authority.  
15 Unless the city council was the considered the final policy maker, the  
16 Court cannot impose liability under §1983 for its inaction. Plaintiff  
17 cites no authority to support that proposition.

18 Therefore, the Court grants Defendants' Motion for Summary  
19 Judgement as to the city council members and dismisses them from this  
20 action.

21 G. Motion to Exclude Experts

22 Defendants have also moved to exclude expert testimony offered  
23 by Mr. Cronk. ECF No. 68. Mr. Cronk, in both oral argument and in  
24 briefing, conceded the motion and informed the Court that he does not  
25 intend to offer any expert witnesses. The Court, therefore, grants the  
26 Defendants' Motion to Exclude Experts, ECF No. 68.

